108-277

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~409.~~ 214

THE LITTLE MIAMI AND COLUMBUS AND XENIA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED APRIL 24, 1880.

SUPREME COURT OF THE UNITED STATES.

No. 499.

THE LITTLE MIAMI AND COLUMBUS AND XENIA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

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1 At a stated term of the circuit court of the United States within and for the sixth judicial circuit and southern district of Ohio, begun and held at the court-rooms in the city of Cincinnati, on the first Tuesday of February, being the third day of that month, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States of America the one hundred and fourth.

Present, the honorable Philip B. Swing, district judge.

Among the proceedings had were the following, to wit:

THE UNITED STATES OF AMERICA
vs.
THE LITTLE MIAMI AND COLUMBUS AND XENIA Railroad Company. } 2045. Money.

Be it remembered that heretofore, to wit, on the twenty-ninth day of March, in the year of our Lord one thousand eight hundred and seventy-five, came the district attorney on behalf of the United States and filed its petition against the said defendant, clothed in the words and figures following, to wit:

2 *Petition.*

Circuit court of the United States, southern district of Ohio.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE LITTLE MIAMI AND COLUMBUS AND XENIA Railroad Company, defendant. } 2045.

The plaintiff, The United States of America, by Warner M. Bateman, its attorney, says that the defendant, The Little Miami and Columbus and Xenia Railroad Company, is a corporation under the laws of the State of Ohio, and has its principal business office within the southern district of Ohio, and that said defendant is indebted to the plaintiff as follows, to wit:

FIRST COUNT.—In that the said railroad company during the year ending November 30th, A. D. 1864, did earn certain profits, to wit, the sum of one hundred & thirty thousand three hundred and fifty-nine $\frac{56}{100}$ ($130,359.56) dollars, which were carried to the account of some fund and used for construction; whereby the said railroad company became liable to pay to the plaintiff a tax of five per cent. on said

3 amount. Yet the defendant, though often requested to pay said taxes, has not paid the same, or any part thereof, and is now indebted to the plaintiff on account thereof in the sum of six thousand five hundred & seventeen $\frac{98}{100}$ ($6,517.98) dollars, together with a penalty of five per cent. thereon and interest from the 1st day of December, 1864, at one per cent. per month.

SECOND COUNT.—And also in that the said railroad company during the year ending November 30th, A. D. 1865, did earn certain profits, to wit, the sum of one hundred & fifty thousand seven hundred & fifty $\frac{12}{100}$ dollars ($150,750.12), which were carried to the account of some fund and used for construction; whereby the said railroad company became liable to pay to the plaintiff a tax of five per cent. on said amount. Yet the defendant, though often requested to pay said taxes, has not paid the same, or any part thereof, and is now indebted to the plaintiff

on account thereof in the sum of seven thousand five hundred and thirty-seven $\frac{51}{100}$ ($7,537.51) dollars, together with a penalty of five per cent. thereon & interest from the 1st day of December, A. D. 1865, at the rate of one per cent. per month.

THIRD COUNT.—And also in that the said railroad company during the year ending November 30th, 1866, did earn profits, to wit, the
4 sum of eighty-four thousand two hundred & ninety-five $\frac{43}{100}$ dollars, which were carried to the account of some fund and used for construction; whereby the said railroad company became liable to pay to the plaintiff a tax of five per cent. on said amount. Yet the defendant, though often requested to pay said taxes, has not paid the same, or any part thereof, and is now indebted to the plaintiff on account thereof in the sum of four thousand two hundred and fourteen $\frac{67}{100}$ dollars ($4,214.67), together with a penalty of five per cent. thereon and interest from the 1st day of December, A. D. 1866, at one per cent. per month.

FOURTH COUNT.—And also in that the said railroad company during the year ending November 30th, A. D. 1867, did earn certain profits, to wit, the sum of twenty thousand seven hundred and forty-two $\frac{85}{100}$ ($20,742.85) dollars, which were carried to the account of some fund and used for construction; whereby the said railroad company became liable to pay to the plaintiff a tax of five per cent. on said amount. Yet the defendant, though often requested to pay said taxes, has not paid the same, or any part thereof, and is now indebted to the plaintiff on account thereof in the sum of one thousand & thirty-seven $\frac{14}{100}$ ($1,037.14) dollars, with a penalty of five per cent. thereon and
5 interest from the 1st day of December, A. D. 1867, at one per cent. per month.

FIFTH COUNT.—And also in that the said railroad company during the year ending November 30th, A. D. 1868, did earn certain profits, to wit, the sum of thirty-eight thousand eight hundred & seventy-two $\frac{14}{100}$ ($38,872.14) dollars, which were carried to the account of some fund and used for construction; whereby the said railroad company became liable to pay to the plaintiff a tax of five per cent. on said amount. Yet the defendant, though often requested to pay said taxes, has not paid the same, or any part thereof, and is now indebted to the plaintiff on account thereof in the sum of nineteen hundred and forty-three $\frac{61}{100}$ ($1,943.61) dollars, together with a penalty of five per cent. thereon and interest from the 1st day of December, A. D. 1868, at one per cent. per month.

SIXTH COUNT.—And also in that the said railroad company during the year ending November 30th, A. D. 1869, did earn certain profits, to wit, the sum of one hundred & seven thousand and eighty-five $\frac{79}{100}$ ($107,085.79) dollars, which were carried to the account of some fund and used for construction; whereby the said railroad company became liable to pay to the plaintiff a tax of five per cent. on said amount. Yet the defendant, though often requested to pay said taxes, has
6 not paid the same, or any part thereof, and is now indebted to the plaintiff on account thereof in the sum of five thousand three hundred and fifty-four $\frac{29}{100}$ ($5,354.29) dollars, together with a penalty of five per cent. thereon & entered from the 1st day of December, A. D. 1869, at one per cent. per month.

Wherefore the plaintiff sues the defendant aforesaid for the several sums so due and payable, to wit:

The sum of $6,517.98, together with five per cent. penalty & interest from December 1st, 1864, at the rate of one per cent. per month.

The sum of $7,537.51, together with five per cent. penalty and interest from December 1st, 1865, at the rate of one per cent. a month.

The sum of $4,214.67, together with five per cent. penalty and interest from December 1st, 1866, at the rate of one per cent. per month.

The sum of $1,037.25, together with five per cent. penalty and interest from December 1st, 1867, at the rate of one per cent. a month.

The sum of $1,943.61, together with five per cent. penalty and interest from December 1st, 1868, at the rate of one per cent. a month.

The sum of $5,354.29, together with five per cent. penalty and interest from December 1st, 1869, at the rate of one per cent. a month.

7 And prays judgment thereon.

WARNER M. BATEMAN,
U. S. Att'y, S. D. O.

Precipe.

THE UNITED STATES
vs.
LITTLE MIAMI & COLUMBUS & XENIA RAILroad Co. } 2045.

The clerk will issue summons on the foregoing petition, returnable according to law. Action for recovery of money only.

Amounts claimed:

$6,517.98, with interest at rate of one per cent. per month from Dec'r 1, 1864, and five per cent. penalty.

$7,537.51, with interest at one per cent. per month from Dec'r 1, 1865, and five per cent. penal'y.

$4,214.67, with interest at one per cent. per month from Dec'r 1, 1866, and five per cent. penalty.

$1,037.25, with interest from Dec'r 1st, 1867, at rate of one per cent. per month, and five per cent. penalty.

$1,943.61, with interest from Dec'r 1st, 1868, at rate of one per cent. per month, & five per cent. penalty.

$5,354.29, with interest from Dec'r 1st, 1869, at rate of one per cent. per month, & five per cent. penalty.

WARNER M. BATEMAN,
U. S. Att'y.

8 And thereupon there was issued out of the clerk's office of the court aforesaid our certain writ of summons directed to the marshal of said district and against said defendant, clothed in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

The President of the United States of America to the marshal of the southern district of Ohio, greeting:

You are hereby commanded to summon The Little Miami & Columbus and Xenia Railroad Company, citizen of and resident in the State of Ohio, if it be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the 4 Tuesday in the month of April, 1875, to answer unto the United States in an action for the recovery of money only. And have you then and there this writ, on the 2 Tuesday April.

Witness the honorable M. R. Waite, Chief Justice of the United States, this 29th day of March, A. D. 1875, and in the 99 year of the Independence of the United States of America

[SEAL.] Attest: THOS. AMBROSE, *Clerk.*

9 Upon which said writ was the following endorsement, to wit:

Action for the recovery of money only. Amount claimed $6,517.98, with interest at rate of one per cent. per month from Dec. 1st, 1864, and five per cent. penalty; $7,537.51, with interest at one per cent. per month from Dec'r 1, 1865, & five per cent. penalty; $4,214.67, with interest at one per cent. per month from Dec'r 1st, 1866, & five per cent. penalty; $1,037.25, with interest from Dec. 1st, 1867, at rate of one per cent. per month & five per cent. penalty; $1,943.61, with interest from Dec. 1st, 1868, at rate of one per cent. per month and five per cent. penalty; $5,354.29, with interest from Dec. 1, 1869, at rate of one per. cent. per month and 5 per cent. penalty, for which judgment will be taken if you fail to answer as herein required.

And afterward, to wit, on the eighth day of April, in the year last aforesaid, came the said marshal, to whom the said writ was in form aforesaid directed, and returned the same into the clerk's office of the court aforesaid, with his proceedings endorsed thereon in the words and figures following, to wit:

I received this writ at Cin'ti, O., at 4 p. m., Mar. 29th, 1875, and served by true copy in Ham. Co., as follows: on the within-named

10 The Little Miami and Columbus and Xenia Railroad Company, by delivering a true copy hereof to S. E. Wright, treasurer, April 1st, '75, at 10 a. m., and by delivering a true copy hereof to Henry Hanna, vice-president, at 11.20 a. m., April 8th, 1875.

W. R. THRALL, *U. S. M.*,
By J. H. WEAVER, *D'p'ty.*

And afterward, to wit, on the second day of February, in the year of our Lord one thousand eight hundred and seventy-six, an entry was made upon the journal of said court in said cause clothed in the words and figures following, to wit:

THE UNITED STATES
vs.
THE LITTLE MIAMI, C. & X. R. R. CO. } 2045. Money.

On motion to the court, it is ordered that the default herein be, and the same is hereby, set aside, and the defendant have leave to file its answer herein forthwith, and the same is accordingly filed.

Which said answer is in the words and figures following, to wit:

11 *Answer.*

In the United States circuit court, southern district of Ohio.

THE UNITED STATES
vs.
THE LITTLE MIAMI AND COLUMBUS AND XENIA RAILROAD COMPANY. } 2045.

The defendant, for answer to the petition, says:

For a first defense—

That the plaintiff ought not to have or maintain the said action

against it, because it says that at the several times and in the manner required by the acts of Congress then in force, for the periods mentioned in the said several counts in the said petition, the defendant made and rendered to the assessor of internal revenue for the proper collection district the lists and returns, for the several periods aforesaid, of all the profits earned by this defendant carried to the account of any fund or used for construction, together with the amount of the taxes accruing thereon respectively, which were thereupon severally assessed against this defendant and paid by it according to law; and this defendant says that the said several amounts alleged in the several counts in the petition of the plaintiff as accruing as taxes upon
12 the said profits of the defendant therein alleged to have been earned have never been assessed against this defendant, nor were the said several amounts as aforesaid entered by the assessor of the said district, or any monthly or special list of taxes certified or returned by him to the collector of the district for collection within fifteen months from the 13th day of July, 1866, nor within fifteen months from the time when the said several lists or returns of said profits, for the said several periods as aforesaid, made and returned by the defendants as aforesaid, were delivered by the said assessor to the collector of said collection district; by reason whereof the defendant says it is not liable to pay the said several amounts in the said several counts of the petition mentioned and for which the plaintiff demands judgment.

And for a second defense—

The defendant says that it denies each and every allegation in said several counts of the petition.

MATTHEWS, RAMSEY & MATTHEWS,
Attorneys for Defendant.

STATE OF OHIO,
Hamilton County, ss:

S. E. Wright, upon oath, says that he is treasurer of the said
13 defendant, The Little Miami Railroad Company, and that the allegations of the foregoing answer are true as he verily believes.

S. E. WRIGHT.

Sworn to before me and subscribed in my presence this 2d day of February, A. D. 1876.

[NOTARIAL SEAL.] MILLER OUTCALT,
Notary Public, Ham. Co., O.

14 And afterward, to wit, on the fifteenth day of September, in the year of our Lord one thousand eight hundred and seventy-seven, an entry was made upon the journal of said court in said cause clothed in the words and figures following, to wit:

THE UNITED STATES
vs.
THE L. M. AND C. & X. R. R. CO. } 2045. Money.

On motion, it is ordered that the default herein be, and the same is hereby, set aside, and the plaintiff has leave to file its reply herein forthwith, and the same is accordingly filed.

Which said reply is in the words and figures following, to wit:

Reply.

THE UNITED STATES
vs.
THE L. M. AND C. & X. R. R. Co. } 2045.

The plaintiff for reply to the first defense by the defendant pleaded denies that defendant made and rendered to the assessor of internal revenue, for the proper collection district, lists and returns of all profits earned and carried to the account of any fund or used for construction, together with the amount of taxes thereon, which were thereupon assessed and paid according to law; but plaintiff says that the several amounts in the petition set forth were so earned and used in addition to the several amounts included in the lists and returns made by defendant.

CHANNING RICHARDS,
U. S. Att'y.

And afterward, to wit, on the thirteenth day of March, in the year of our Lord one thousand eight hundred and eighty, came the parties, by their attorneys, and filed in the clerk's office of the court aforesaid their certain waiver of jury to try the issue herein, clothed in the words and figures following, to wit:

THE UNITED STATES
against
THE LITTLE MIAMI RAILROAD COMPANY. } No. 2045.

It is hereby stipulated that the right of trial by jury shall be, and is hereby, waived in this cause, and said cause shall be submitted to the court for trial upon all the issues in the cause.

MATTHEWS, RAMSEY & MATTHEWS,
Att'ys for Def'd't.
CHANNING RICHARDS, *U. S. Att'y.*

And afterward, to wit, on the third day of April, in the year last aforesaid, an entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

Circuit court of the United States, southern district of Ohio.

THE UNITED STATES
against
THE LITTLE MIAMI, COLUMBUS AND XENIA Railroad Company. } 2045.

Be it remembered that this cause came on for trial at the present term, the honorable Philip B. Swing presiding. Thereupon, by consent of parties, in writing duly filed, the intervention of a jury was waived and the cause submitted to the court, and upon the testimony the court find the following conclusions of fact:

First. That no assessment or demand, prior to the bringing of this action, has ever been made for any part of the taxes claimed by the plaintiff in the petition.

Second. That during the period covered by the petition, viz, from the 1st day of July, 1864, to the 30th day of November, 1869, inclusive,

the defendant, in good faith, regularly made returns of earnings, profits, income, and gains, and of profits carried to the account of any fund, or used for construction, arising or accruing to it during said period, intended and believed by it to embrace all such profits,
18 income, and gains, and all such profits carried to the account of any fund, or used for construction, which by law it was bound to return; which returns were received and accepted, and for the amount of which assessments from time to time were made of the taxes payable thereon, which taxes were regularly paid by it to the officer lawfully authorized to collect the same.

Third. That over and above the amount so returned, on which taxes were paid as aforesaid, the defendant did, in fact, make additional earnings, which by it were carried to the account of some fund, or used for construction during said period, amounting in all to the sum of one hundred and sixty-eight thousand seven hundred and seven dollars and twenty-two cents, on which no tax has been paid.

Fourth. That in the year 1869 the defendant carried to the debit of profit & loss on its books various items, amounting in all to the sum of one hundred and eighty-four thousand three hundred and ninety-five dollars and six cents, so that, by reason of said charges, the books of the defendant show no profits beyond the amount on which the taxes have been paid by it as aforesaid during said period.

19 Of that sum fifty-one thousand one hundred and fifty-five dollars and forty-four cents represented loss and depreciation on book accounts and other choses in action which had been acquired by the company prior to July 1st, 1864, and which had been standing on its books at their nominal or par value.

Twenty-two thousand dollars of said sum represented a depreciation in the value of certain bonds purchased by the defendant in the year 1864, but subsequent to July first, at par, and which had stood on its books at their nominal value.

One hundred and six thousand fourteen dollars and sixty-two cents of said sum represented a depreciation in the value of what was known as the "street-connection track," being a street-railroad connection between the depot of defendant, in the city of Cincinnati, and the depot of other roads in said city, the said track being laid through the streets of said city, but used by the defendant in connection with its business for the interchange of traffic, and which had been built and operated by it.

Five thousand two hundred and twenty-five dollars of said sum represented the loss of that amount by reason of a purchase, in 1867, of shares of capital stock of a cotton-press company, invested in a
20 cotton press intended to be used in connection with the defendant's railroad business, but proving useless, the stock having depreciated in fact to that extent.

The said items were, in 1869, charged to the account of profit and loss, after an inventory and appraisement made by order of the directors, by a committee of its board, for the purpose of ascertaining the actual value of its assets, and in order to conform the apparent value, as shown on its books, with their actual value. At that time there was a negotiation pending for a perpetual lease of the road and property of the defendant to the Pittsburg, Cincinnati and St. Louis Railway Company, and it was in view of that lease that said inventory, appraisement, and correction of accounts was made. The same was in accordance with the facts.

Fifth. That the defendant company did execute and deliver to the

Pittsburg, Cincinnati and St. Louis Railway Company a lease of its railroad and property, dated on the 23d day of February, 1870, but taking effect on the 1st day of December, 1869, by which it transferred perpetually to the lessee all its property and assets at an agreed rental of eight per cent. per annum on six millions of dollars, which lease has been in force from that time, and still is, and the lessee in pos-
21 session of the demised premises.

And thereupon, upon the forgoing conclusions of fact, the court find the following conclusions of law:

An action of debt may be maintained to recover taxes, without an assessment, where the statute describes the subject of the taxes and fixes the rates so that the amount may be ascertained by evidence.

Dollar Savings Bank vs. United States, 19 Wall., 227; The United States vs. Tilden, 24 Int. Rev. Rec., 99.

Nor will the fact that an assessment has been made and paid be a bar to the suit for the recovery of an amount claimed to be due over and above the amount which has been assessed and paid.

United States vs. Heagard, 22 Int. Rev. Rec., 309; United States vs. Tilden, 24 Int. Rev. Rec., 99.

The tax imposed by the 122 section of the statute, although substantially a tax upon the stockholder, so far as it affects and results are concerned, yet the obligation to pay the tax is in this section imposed upon the corporation, and this would seem to be the view entertained by the Supreme Court of the U. S. in the Michigan Central Railroad Company vs. Slack (collector). 26. Int. Rev. Rec., 60.

This being an action against the corporation for taxes imposed
22 by statute, and not upon an assessment for taxes, the limitation of fifteen months within which an assessment may be made does not apply; and Congress not having fixed a time within which an action of this character shall be brought, no laches can be imputed to the government, and against it no time can run so as to bar its rights. The United States vs. Thompson, 98 U. S., 486; The United States vs. Kirkpatrick, 9 Wheaton, 720; The United States vs. Williams, 5 McLean, 133.

It is not necessary now to consider the effect of the lease by the defendant to the P., C. & St. L. Railway and the Penn. R. R. Company, further than to say that such lease did not dissolve the corporation, and it may still be sued for liabilities incurred prior to such lease. But whether the property can be subjected to the satisfaction of a judgment obtained, and the mode of subjection, are questions not now before the court.

Second. That against the claim of the defendant to deduct from its earnings the said sum of one hundred and eighty-four thousand three hundred and ninety-five dollars and six cents, charged as aforesaid to profit and loss account, for loss and depreciations in the value of its assets, investments, and property, and which, if so permitted, would cancel and extinguish the amount of the balance of the earnings
23 of said company so as aforesaid carried to the account of some fund or used for construction, the court finds that for the purpose of taxation the defendant is not entitled by law to make the deduction as claimed, and therefore finds that the whole of said sum of one hundred and sixty-eight thousand seven hundred and seven dollars and twenty-two cents, being the balance of the earnings for the said period of the said company, carried to the account of some fund or used for construction as ascertained hereinbefore, is liable and subject to the payment of a tax of five per centum on the amount thereof.

To each of which conclusions of law the defendant then and there excepted, and prayed that his exceptions might be entered of record, which is accordingly done.

It is therefore by the court considered that the plaintiff recover of the defendant the sum of eight thousand four hundred and thirty-five dollars and thirty-six cents, together with its costs in this behalf expended, and execution is awarded therefor.

24 And afterward, to wit, on the tenth day of April, in the year last aforesaid, came the defendants by their attorney, and filed in the clerk's office of the court aforesaid their assignment of errors herein, clothed in the words and figures following, to wit:

25 In the Supreme Court of the United States.

THE LITTLE MIAMI AND COLUMBUS AND Xenia Railroad Companies, plaintiffs,
vs.
THE UNITED STATES OF AMERICA, defendant.
} In error.

And now come the Little Miami and Columbus and Xenia Railroad Companies, plaintiffs in error, and say, that in the record of the proceedings and judgment of the circuit court of the United States for the southern district of Ohio, aforesaid, there is manifest error, to their prejudice, and for cause of error assign the following, to wit:

1. That the said court erred in holding and deciding that the United States could maintain its action without having previously caused to be made an assessment of the said taxes.

2. That the said court erred in not allowing the claim of the defendants below, the plaintiffs in error, to deduct from their earnings the said sum of one hundred and eighty-four thousand three hundred and ninety-five dollars and six cents, or some of the items composing the same, charged by them to profit and loss account, for loss and depreciations in the value of their assets, investments, and property.

3. That the said court erred in finding and determining that the whole of said sum of one hundred and sixty-eight thousand seven hundred and four dollars and twenty-two cents is liable and sub-
26 ject to the payment of a tax of five per centum on the amount thereof.

4. That the said court erred in its several conclusions of law and in each of them.

5. That the said court erred in rendering judgment in favor of the plaintiff below.

6. That the said court erred in not rendering judgment in favor of the defendants below, the plaintiffs in error.

Wherefore, the plaintiffs in error pray that the said proceedings and judgment of the said circuit court of the United States may be reviewed and reversed and held for naught, and that they may be restored to all things they have lost thereby, and they will ever pray, &c.

STANLEY MATTHEWS,
Attorney for Plaintiffs in Error.

27 And afterward, to wit, on the 13th day of April, in the year last aforesaid, came the said defendant, by its said attorneys, and filed in the clerk's office of the court aforesaid its certain error-bond in said cause, clothed in the words and figures following, to wit

Circuit court of the United States, southern district of Ohio.

THE LITTLE MIAMI AND COLUMBUS & XENIA Railroad Companies
vs.
THE UNITED STATES OF AMERICA. } In error.

Know all men by these presents that we, Alfred Gaither and Henry Hanna, are held and firmly bound unto The United States of America, defendant in error, in the sum of sixteen thousand dollars, to be paid to the said United States of America, executors, or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors, and administrators firmly by these presents. Sealed with our seals. Dated this 13th day of April, 1880.

28 Whereas the above-named The Little Miami and Columbus and Xenia Railroad Companies have sued out this writ of error to the Supreme Court of the United States to reverse the judgment against them rendered in the above-entitled action by the circuit court of the United States for the southern district of Ohio:

Now, therefore, the condition of this obligation is such that if the above-named The Little Miami & Columbus & Xenia Railroad Companies shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation to be void; otherwise to remain in full force and virtue.

ALFRED GAITHER. [SEAL.]
HENRY HANNA. [SEAL.]

Sealed and delivered in presence of—
STANLEY MATTHEWS.

The above security is approved.

PHILIP B. SWING,
District Judge of the United States, S. D. O.

29 UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

I, William C. Howard, clerk of the circuit court of the United States for the southern district of Ohio, hereby certify the foregoing to be a true and correct transcript of the record and proceedings in the case wherein the United States is plaintiff, and the Little Miami, Columbus and Xenia R. R. Company is defendant, as the same remain in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Cincinnati, this 13th day of April, A. D. 1880, and of the Independence of the United States of America the one hundred and fourth.

[SEAL.] Attest:

W. C. HOWARD,
Clerk U. S. Cir. Crt, S. D. O.

30 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of Ohio, greeting:

Because in the records and proceedings, and also in the rendition of

the judgment, of a plea which is in the said circuit court before you, between The United States of America and The Little Miami & Columbus & Xenia Railroad Company, a manifest error hath happened, to the great damage of the said The Little Miami and Columbus & Xenia Railroad Company, as by their complaint appears: We being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 13th day of April, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.] WILLIAM C. HOWARD,
Clerk of the Circuit Court of the U. S., S. D. O.

(Indorsed:) U. S. circuit court. No. 2045. The United States vs. The Little Miami and Columbus & Xenia Railroad Co. Writ of error. Filed , 18 . , clerk.

31 THE UNITED STATES OF AMERICA, *ss:*

To the United States of America, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, wherein The Little Miami and Columbus & Xenia Railroad Company are plaintiffs, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, this 13th day of April, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.] PHILIP B. SWING,
District Judge sitting and holding the Circuit Court.

32 SOUTHERN DISTRICT OF OHIO, *ss:*

Received this writ at Cincinnati, Ohio, April 13th, 1880, and at 12.30 p. m. of that same day served the same by delivery of true copy hereof to Channing Richards, district attorney of the United States for the southern district of Ohio.

J. C. ULLEY, *U. S. Marshal,*
By T. M. TURNER, *Deputy.*

Service, 2.00; copying, 50—2.50.

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(Indorsement on cover:) No. 499. The Little Miami & Columbus & Xenia Railroad Company, plaintiff in error, vs. The United States. S. Ohio C. C. U. S. Filed 24th April, 1880.

108-277

OFFICE SUPREME COURT U. S.
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SUPREME COURT OF THE UNITED STATES.

THE LITTLE MIAMI RAILROAD COMPANY,

Plaintiff in Error,

AGAINST

THE UNITED STATES,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

WM. M. RAMSEY,
Attorney for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

THE LITTLE MIAMI RAILROAD COMPANY,

Plaintiff in Error,

AGAINST

THE UNITED STATES,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

THE action below was to recover a tax upon profits not assessed, but alleged to have been made and carried to account of some fund, etc., and to be taxable, therefore, under the act of June 30, 1864 (13 Stat. at L. 284), as amended July 13, 1866 (14 Stat. 98).

Judgment was rendered for plaintiff upon a special finding of law and fact.

The material findings of fact are:

1st. That, between July 1, 1864, and November 30, 1869, the defendant regularly made returns of all gains and profits believed by it to be taxable, and paid the taxes assessed thereon.

2d. That, in addition to the amounts so returned, the defendant, *during the period aforesaid*, "did, in fact make additional *earnings*, which by it were carried to the account of some fund, or used for construction *during said period*," amounting to $168,707.22, upon which no tax had been paid.

3d. That, in the year 1869, the defendant made entries in its books to the debit of profit and loss, showing losses to the amount of $184,395.06, "*so that, by reason of said charges, the books of defendant show no profits beyond the amount on which*

the taxes have been paid by defendant, as aforesaid, during said period."

The correctness of these charges, and the good faith of the defendant throughout, is found.

The nature of these charges to profit and loss is stated, and will be hereinafter referred to.

The only question in the cause, therefore, is whether these findings show that the defendant below had made "*profits*" within the meaning of the statute, and used the same in construction, or carried them to a fund upon which taxes became due and remained unpaid.

It is respectfully submitted that the findings do not sustain the judgment.

FIRST: *No "profits" are found to have been made and used in construction*, etc.

No change was made in Sec. 122, of the act of June 30, 1864, by the amendment of July 13, 1866, which affects the present cause. The amendment was made for the purpose of reaching dividends due to non-residents and aliens, and the term "tax" was substituted for the word "duty."

It will be seen that in the original section, and in the amended section, a plain distinction is made between that which is taxable in the form of a dividend, and that which is taxable as a sum "used in construction or carried to the account of any fund." The declaration and payment of a dividend creates an absolute liability to pay the tax whether it be made from "earnings" or "profits." Money used in construction or carried to a fund is taxable only if it be "profits."

Hence it was declared in *Bailey vs. Collector*, October T., 1882, that the making of the dividend would be conclusive upon the corporation, that it was made from "earnings, gains, or profits." Dividends are made only from these sources.

The statute dealt with the subject upon the assumption that dividends were thus declared and paid. Therefore, in the opinion above referred to, the provisions respecting interest upon bonds are said to be "exceptional."

But no such considerations apply to construction. Corporations borrow money to build new works, and may judiciously do so. If "profits" be so used they are made subject to the tax, but construction otherwise paid for, is not taxable. So, a fund is not taxable unless it be a fund composed of "profits." It follows that, in every case, the question whether the obligation to pay such a tax has arisen *is purely a question of fact.*

The second finding of fact in this cause is that the defendant below had made regular returns of its "earnings, profits," etc., from June 30, 1864, to November 30, 1869, believed by it to be correct; the third finding is that, over and above the amount so returned, it had made "*additional earnings,*" etc.

This is not a finding that additional profits had been made. It had returned for taxation, according to the finding (p. 6), its "earnings, profits, income, and gains, and of profits carried to the account of any fund, or used for construction." The third finding is not that there were additional "earnings, profits, income," etc., but additional "earnings" only. Unless, therefore, "earnings" and "profits" be convertible terms, there is here no finding whatever that any profits had been made, other than those which had been regularly returned for taxation. They are not convertible terms by any means. A railroad company may have large gross earnings, and no net earnings. Hence it will have "earnings," but not "profits." It may have large earnings, and uniformly close its accounts with the showing of an actual loss. The distinction is plain, and is clearly observed in the statute under consideration.

SECOND. The finding that "earnings" were used in construction, or carried to a fund, is immaterial.

Certainly this is an immaterial finding, unless "earnings" and "profits" mean the same thing, as the tax is laid upon "profits" only. It can not be said that there is any ground for the presumption that earnings used in construction are profits. A railroad company finding itself in need of a sidetrack, or a track connecting its road with that of another company, could use its current earnings in the construction of

either or both of these conveniences, without reference to the effect which such use would have upon the state of its accounts at the close of its fiscal year. Such account, when made up, might show that the money thus used was profit, or it might show that the business of the year had not paid the operating expenses of the road. And it might be clear that the use of these earnings had been wise and judicious, and had increased the earning power of the road greatly beyond the interest upon the sum thus invested, but still it would appear that the investment was made only from earnings, and not from profits. It might appear that the company had made a profit equal to all or some part of the money thus expended in construction. In that event it would be liable to tax upon the amount of profit thus used. To illustrate:

1. Company's gross earnings, 1864 to 1869,	$100,000
" expenses, " " "	80,000
Net earnings,	$20,000
Company has expended in building connection tracks,	50,000
Expended over earnings,	$30,000

Assuming that the company had no other gains or losses, this statement shows a profit of $20,000, which would be taxable.

2. Company has gross earnings, $100,000. Gross expenses, $100,000. Expends $50,000 of *its earnings* in construction. It is in debt $50,000 at the end of the period, and is under no liability to the government. It has made neither profit nor loss, although it has had earnings.

Indeed, it is quite common in human experience, that large earnings may be made, and contemporaneously, large losses, resulting in insolvency.

Hence, the plaintiff below was required to establish by proof that the defendant had used earnings in construction, and that such earnings represented actual profit. There being no such finding in the record, and no finding of that which is equivalent thereto, no liability is established.

THIRD. *The record shows affirmatively that no profit was made, used, or carried to any fund.*

It is to be borne in mind that the findings deal with a single period, to wit, that which began June 30, 1864, and ended November 30, 1869. The question, then, is, whether profits were used in construction, or carried to a fund, within that entire period, upon which taxes were not paid. There is no basis for making a separation of this period into annual periods, or directing an inquiry into the state of the account for any single year. If it were conceded, therefore, that the word "earnings," in the third finding of fact, is to be held to mean "profits," still it must be taken in connection with the fourth finding. So that the conclusion would be, that profits had been made to the amount of $168,000 during the period in question, and used in construction, or carried to a fund, but that during the same period losses had been sustained amounting to $184,000. As has been said, no separation of this period can be made, and no part of the profit can be assigned to any other, or shorter, period. If it were permissible to divide the whole period into five annual and one semi-annual period, and distribute the profit equally or otherwise among the several periods thus created, it would be necessary to distribute the losses in the same way, and in the same proportion, so that in each period a loss would appear greater than the gain. So that, in any view, if these losses be considered at all, there was no profit.

That these findings show losses which should be deducted from gains or profits, in making up the balance on November 30, 1869, there can be no doubt.

The statute does not limit its operation to profits of any particular kind, or made in any particular manner. A railroad company, for instance, must pay the tax upon its gains and profits, no matter how they are acquired. It is not confined to the profits made in the operation of its railroad. This, it is true, is its principal business; but in the conduct of this business it may enter into engagements in various forms, and acquire various rights and interests. The plaintiff in error is an Ohio corporation. Under the laws of that State a railroad company has corporate power to build branches (Sec. 3280, Rev. St.); to build and use toll-bridges (Sec. 3285); to aid other compa-

nies by means of subscription to their capital stock or otherwise, and to enter into engagements generally with other companies for mutual benefit (Sec. 3300); to take stock in carrier companies (Sec. 3839); in elevator companies (Sec. 3841). These provisions show that a railroad company in Ohio may operate a railroad, and do many other things. The tax which is provided for by Sec. 122 of the Internal Revenue law is a tax upon the profits of *the company*, and not upon the profits of the company's road. Hence, in ascertaining whether a profit has been made by the company or not, its general balance-sheet must be examined. This includes all of its accounts. Profit may have been made in some departments of its business, and lost in others. Hence, no profit at all has been made within the meaning of this law.

According to the findings, the following state of fact may be supposed to have existed with reference to the accounts of defendant below, to wit:

June 30, 1864. Little Miami Railroad Company.

ASSETS.

Railroad and equipment,	$1,000,000
Connection track,	250,000
Book accounts,	100,000
Bonds,	50,000
Cotton-press stock,	50,000
Total,	$1,450,000

LIABILITIES.

Capital stock,	$1,450,000

November 30, 1869.

ASSETS.

Railroad,	$1,000,000
Connection track,	144,000
Book accounts,	49,000
Bonds,	28,000
Cotton-press stock,	44,775
Total,	$1,265,775
Loss by depreciation,	184,225
	$1,450,000

Upon this state of account no tax upon profits would appear to be due. No doubt would exist that a loss had been made. This upon the assumption that earnings had equaled operating

expenses. Let it be assumed that the account of receipts and expenditures would show the following result:

Gross earnings from June 30, 1864, to Nov. 30, 1869,	$1,000,000
All expenses,	815,775
	$184,225

This sum, $184,225, is used in construction. Assuming the value of the new structures to be equal to the expenditure, the assets of the Company would be the same on November 30, 1869, that they were on June 30, 1864. No profit has been either made or used in construction.

It is not supposed that, where profits have actually been made and used in construction, that the value of the new structures is important. The tax is upon the profit invested in new structures, and not upon the structures themselves. But it is equally true that the amount of money invested in the structures, or the source whence it is derived, is immaterial, unless it be derived from *profits*, in the usual and ordinary signification of that term.

It is not supposed that, if profits had been made in 1864 or 1865, and invested in new structures, so that a tax had attached to them for that period, that a loss of any kind in 1868 or 1869 would affect that liability. But that question is not presented by this record. There is but a single period covered by the finding, and in this period the earnings used in construction were made and the losses suffered.

The items of loss are as follows:

1. Loss and depreciation upon book accounts and other choses in action, which had been acquired prior to July 1, 1864, but which were held by the company on and after that date, $51,155.

2. Depreciation in value of bonds purchased after July 1, 1864, $22,000.

3. Depreciation in value of connection-track, $106,014.

4. Loss upon cotton-press company stock, $5,225.

These are losses in the ordinary course of the general business of the corporation. Accounts became worthless; bonds declined in actual value; the connection-track declined in value by

wear and tear, and other causes; the cotton-press stock sold for less than it cost. In any sense, these are losses. In any sense, they show that, during the period in which these losses occurred, the company could make no "profit," unless its income from all sources exceeded its expenses and the amount of these losses added. Up to that point, gains would merely equal losses, and the final result would show no profit.

This would be true if the record showed that *profits* had been invested; that is, that, leaving these losses out of view, profits had been made and invested. But such is not the case. The court only found that "earnings" had been invested. It is quite consistent with this finding that, leaving these losses out of view, there were no profits.

WM. M. RAMSEY,

Attorney for Plaintiff in Error.

108-277

OFFICE SUPREME COURT U.S.
FILED
MAR 29 1883
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In the Supreme Court of the United States.

OCTOBER TERM, 1882.

THE LITTLE MIAMI, &c., RAILROAD COMPANY
vs.
THE UNITED STATES.
No. 214.

BRIEF FOR THE UNITED STATES.

This was an action to recover taxes claimed as due upon certain *profits*, &c.

Trial by jury was waived; and the facts were found by the court. These findings, and the conclusions of law therefrom, as the latter appeared below, and as they are contended for here on behalf of the United States, are to be found upon pages 6, &c., of the record.

Any further statement of that contention seems to be unnecessary.

S. F. PHILLIPS,
Solicitor-General.

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